



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. **75-939**

MESCALERO APACHE TRIBE, ET AL.,
SHOSHONE-BANNOCK TRIBES OF THE
FORT HALL RESERVATION, IDAHO, AND
TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS
OF NEVADA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

I. S. WEISSBRODT
RICHMOND F. ALLAN
Weissbrodt & Weissbrodt
1614 Twentieth Street, N.W.
Washington, D.C. 20009

Of Counsel:

HOWARD L. SRIBNICK
ROBIN A. FRIEDMAN

FRANCES L. HORN
PIERRE J. LAFORCE
Wilkinson, Cragun & Barker
1735 New York Ave., N.W.
Washington, D.C. 20006

January 2, 1976

Counsel for Petitioners.

(i)

TABLE OF CONTENTS	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	13

TABLE OF CONTENTS OF SEPARATELY-BOUND APPENDICES	App. Page
A. Opinion and Judgment of Court of Claims	1
B. Order of Court of Claims denying rehearing	53
C. Opinion and orders of Indian Claims Commission in Docket Nos. 326-A and 22-G	55
D. Order of Commission in Docket No. 326-C	186
E. Opinion and Order of Commission denying rehearing in Docket No. 326-A	189
F. Statutes Involved	
(1) Act of September 11, 1841 and 31 U.S.C. §547a	208
(2) Section 28 of Act of May 25, 1918 and 25 U.S.C. §162a	209
(3) Acts of March 3, 1883 and March 2, 1887 and 25 U.S.C. §155	212
(4) 25 U.S.C. §161b	213
(5) Clauses 1, 2, and 5 of section 2 of Indian Claims Commission Act	214
(6) Constitution of the United States, Amend- ment V	214

(ii)

TABLE OF AUTHORITIES

Page

Cases:

Cheyenne-Arapaho Tribes v. United States, 206 Ct. Cl. —, 512 F.2d 1390 (1975)	9
Chippewa Indians v. United States, 301 U.S. 358 (1937)	10
Henkels v. Sutherland, 271 U.S. 298 (1926).	10
Menominee Tribe v. United States, 101 Ct. Cl. 10 (1944).	11
Peoria Tribe v. United States, 390 U.S. 468 (1968).	9
Seminole Nation v. United States, 316 U.S. 236 (1942)	11
United States v. Blackfeather, 155 U.S. 180 (1894)	9

Miscellaneous:

Restatement (Second) Trusts (1959).	9, 11
---	-------

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

MESCALERO APACHE TRIBE, ET AL.,
SHOSHONE-BANNOCK TRIBES OF THE
FORT HALL RESERVATION, IDAHO, AND
TE-MOAK BANDS OF WESTERN SHOSHONE INDIANS
OF NEVADA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

Petitioners¹ respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in its consolidated Appeal Nos. 2-74, 10-74 and 12-74 on July 11, 1975 (rehearing denied October 3, 1975), reversing the decision and orders of the Indian Claims Commission holding the

¹Petitioners are all American Indian tribes. Before the Indian Claims Commission, in Docket Nos. 22-G, 326-C and 326-A, respectively, each sued separately for a general accounting and complained, among other things, of the failure of the government to have made certain of its trust funds productive. The Commission

[Footnote continued]

United States liable, where it had unilaterally taken possession as trustee of certain funds belonging to petitioners, for failing to have made such funds productive for petitioners' benefit.

OPINIONS BELOW

The opinion of the Court of Claims, not yet officially reported, and the opinion and orders of the Indian Claims Commission, reported at 31 Ind. Cl. Comm. 427, 557 and 559,² are reproduced respectively as separately bound Appendices A, C and D hereto. The opinion of the Court of Claims is unofficially reported at 518 F.2d 1309.

JURISDICTION

The judgment of the Court of Claims was entered on July 11, 1975. A timely motion for rehearing was denied on October 3, 1975 (App. B), and this petition was filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1255(1) and 25 U.S.C. § 70s(c).

QUESTION PRESENTED

Where the United States, of its own volition and without the consent of petitioners, took possession as trustee of certain funds constituting proceeds of sales of

considered and decided Docket Nos. 22-G and 326-A together. Deeming its decision in those cases dispositive of the same issue in Docket No. 326-C, it entered an order of liability therein as well. On appeal by the government to the Court of Claims, the Mescalero case, Appeal No. 2-74, the Shoshone-Bannock case, Appeal No. 10-74, and the Te-Moak case, Appeal No. 12-74, were consolidated and disposed of by a single judgment and opinion. This petition is filed jointly pursuant to Rule 23(5) of this Court.

²The order of the Commission in the Shoshone-Bannock case, Docket No. 326-C, is unreported.

products and resources, and of interests in lands, of petitioners' several reservations, which funds were petitioners' private property; and

Where the United States deposited such funds to petitioners' credit in an account in its own Treasury, thereby obtaining the use of such funds for its own benefit;

Whether the United States was obligated either, as trustee, to make such funds productive of income for petitioners' benefit or, as sovereign, to compensate petitioners for the taking of the use thereof, under 31 U.S.C. 547a or other statutes, the common law of trusts, the standards of fair and honorable dealings, or the provision of the Fifth Amendment of the Constitution of the United States that prohibits the taking of private property for public use without just compensation—all as enforceable under the Indian Claims Commission Act.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) Section 2 of the Act of September 11, 1841, 5 Stat. 465 (31 U.S.C. § 547a) (App. F(1)).

(2) Section 28 of the Act of May 25, 1918, 40 Stat. 561, 591 (formerly 25 U.S.C. § 162, before replacement by Act of June 24, 1938, 52 Stat. 1037 (25 U.S.C. § 162a) (App. F(2)).

(3) Act of March 3, 1883, 22 Stat. 582, 590, as amended and supplemented by Acts of March 2, 1887, 24 Stat. 449, 463, and May 17, 1926, 44 Stat. 560 (25 U.S.C. § 155) (App. F(3)).

(4) Acts of February 12, 1929 and June 13, 1930, 45 Stat. 1164 and 46 Stat. 584 (25 U.S.C. §§ 161a and 161b) (App. F(4)).

(5) Clauses 1, 2 and 5 of section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050 (25 U.S.C. § 70a) (App. F(5)).

(6) Provision of Fifth Amendment of Constitution that prohibits the taking of private property for public use without just compensation. (App. F(6))

STATEMENT OF THE CASE

In 1883, Congress provided that the "proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation . . . not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe. . . ."³

Pursuant to this provision, a trust account (misnamed, "Indian Moneys, Proceeds of Labor") was opened in the Treasury. Into it were deposited in common the miscellaneous revenues (ever since known as IMPL funds) realized by the several tribes, including petitioners, from sales of the products and resources, and of interests in the lands (*e.g.*, grazing leases), of their respective reservations.⁴

As a result of a determination by the Secretary of the Treasury that funds deposited in the IMPL account could not be withdrawn and expended, except upon appropriation by Congress, the 1883 Act was supplemented in

³Act of March 3, 1883, 22 Stat. 582, 590 (App. F(3)).

⁴Although, until 1930, the account was operated as the common depository of the IMPL funds of all the tribes, books were kept showing the amounts of money therein belonging to each.

1887 by a provision authorizing the Secretary "to use the money which has been or may hereafter be covered into the Treasury under the provisions of the [1883 Act], and which is carried on the books of [the Department of the Interior] under the caption of 'Indian moneys, proceeds of labor', for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best. . . ."⁵

The total balance of all tribes in the common IMPL account was approximately \$13,000 in 1885 and \$26,000 in 1886. The Commissioner of Indian Affairs reported a balance of more than \$150,000 in 1890, and balances ranging between \$1,200,000 and \$5,400,000 for various years from 1908 to 1929. The Treasury showed steadily mounting balances from 1896 (about \$250,000) to 1908 (about \$3,500,000), and surpluses, which only once fell below \$2,000,000 and ranged as high as \$9,000,000, during the period from 1912 to 1930.

At no time during the period from 1883 to 1930 was the United States out of debt. When moneys belonging to the Indian tribes were credited to the IMPL account, they were actually taken into the general fund where they were commingled with receipts from other sources (*e.g.*, taxes and borrowings) and used for general government purposes. Because the United States was never free of debt during the period, if it had not had the use of the Indians' moneys credited to the IMPL account, it would have had to borrow an equal amount from others. Of

⁵Act of March 2, 1887, 24 Stat. 449, 463 (App. F(3)). The 1883 Act was further amended and supplemented by the Act of May 17, 1926, 44 Stat. 560, essentially into the form in which it now appears as 25 U.S.C. §155.

course, it would have had to pay such *sui juris* lenders for the use of their moneys, but it denies that it was under any obligation to make the funds it borrowed without their consent from the Indian tribes, to whom it stood in the relationship of guardian and trustee, productive of returns for their benefit.

The government does not dispute that the moneys covered into the IMPL account were the tribes' private property in the constitutional sense; that the United States took possession of such moneys strictly as trustee; or that the balances shown in the IMPL account from time to time represented funds held in trust by the United States.

Upon separate suits by each of the petitioners under the Indian Claims Commission Act for damages for breach of the obligation to have made such funds productive, or for compensation for the taking of their use, the Commission held that between 1883 and 1930⁶ the United States had been obligated to make the funds productive by section 2 of the Act of September 11, 1841, 5 Stat. 464 (App. F(1)),⁷ for breach of which it

⁶After 1930 the IMPL account, formerly operated as a common account, was severalized and simple interest at the rate of four percent was paid on balances therein. Acts of February 12, 1929 and June 30, 1930, 45 Stat. 1164 and 46 Stat. 584 (25 U.S.C. §§161a and 161b) (App. F(4)).

⁷Essentially unchanged from the time of its enactment, this provision now appears as 31 U.S.C. §547a as follows:

All funds held in trust by the United States, and the annual interest accruing thereon, when not otherwise required by treaty, shall be invested in stocks of the United States, bearing a rate of interest not less than 5 per centum per annum. R.S. §3659.

awarded damages measured by compound interest at the rate of five percent.⁸

On appeal by the government, the Court of Claims *en banc* reversed (Judge Davis dissenting), on the grounds that section 2 of the 1841 Act was not applicable and that to permit the tribes to recover would be to allow interest on a claim against the United States.

The court did not address the tribes' contentions that, apart from the 1841 Act, the United States was obligated under other statutes, the common law of trusts, the standards of fair and honorable dealings, and the Constitution, to have made the funds productive or to pay compensation for the taking of their use—all as enforceable under the Indian Claims Commission Act.⁹

In separate motions for rehearing, petitioners urged the court to consider these alternative sources of obligation. The court denied the motions without opinion. Its complete failure to address the issue of the application of the standards of fair and honorable dealings prompted a further dissent from Judge Davis. He deemed this omission an "extraordinary circumstance" compelling departure from his usual practice of not voting for

⁸In Docket No. 326-A, the Commission denied a separate claim of the Te-Moaks that they were entitled to damages for the failure of the government to have made productive certain sums owed under a treaty but not paid. It also denied their motion for rehearing on this point (App. E), and the Court of Claims affirmed. Review of the judgments below on this point is not sought here.

⁹While holding that it was unnecessary to look beyond the 1841 Act to establish the obligation of the government to have made petitioners' IMPL funds productive, the Commission observed that, independently of such act, a similar obligation would have existed under the common law of trusts, the standards of fair and honorable dealings and the 1918 Act.

reconsideration of opinions simply because he had dissented in the first instance. (App. B)

REASONS FOR GRANTING THE WRIT

On the premise that to permit recovery would be to award interest on a claim against the United States, the court below holds that the government, as trustee, can unilaterally take possession of funds belonging to an Indian tribe, place them in its Treasury and use them for its own purposes, without subjecting itself to any obligation to make them productive for the *cestui's* benefit or to pay compensation for the taking of their use.

The decision below warrants review because it involves important issues respecting not only the historic, but also the contemporaneous obligations of the government when it undertakes to act as trustee of funds belonging to an Indian tribe, and respecting the proper construction of a still vital and essentially uninterpreted statute (31 U.S.C. 547a) that has been on the books for 134 years;¹⁰

¹⁰In 1918, Congress ameliorated the strict investment mandate of the 1841 Act by authorizing the Secretary of the Interior to deposit tribal trust funds in banks and to invest them in government bonds generally. It expanded his authority to make such funds productive by investment again in 1938. Section 28 of the Act of May 24, 1918, replaced by Act of June 24, 1938. (App. F(2)).

In 1929-1930, Congress provided for the payment of simple interest at the rate of four percent on tribal funds in the Treasury upon which interest was not otherwise provided. Acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584 (25 U.S.C. §§161a and 161b) (App. F(4)).

At least since about 1968, the Secretary has been utilizing the authority he possess, currently under the 1938 Act, to invest

[Footnote continued]

because it is in conflict in principle with *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (following *United States v. Blackfeather*, 155 U.S. 180); because of the magnitude of the loss a number of tribes will suffer if it is allowed to stand;¹¹ and because the result it reaches is grossly unjust and unfair.

The majority opinion below states repeatedly that the 1841 Act did not obligate the government to *pay interest* on tribal moneys deposited in the IMPL account and that, prior to adoption of the 1930 Act, nothing else did either. Petitioners never contended the contrary.

practically all tribal trust funds in his custody in securities returning substantially more than four percent.

The government continues to insist, however, that it would breach no duty owed the tribes if it elected to leave such funds in the Treasury or if, for its own benefit, it elected to invest them in securities producing less returns than would other equally authorized, appropriate and available securities. In short, the government continues to deny, as trustee of Indian funds, that it owes the same duty to make them productive as would any other trustee. *Restatement (Second) Trusts* §181. See, *Cheyenne-Arapaho Tribes v. United States*, 206 Ct. Cl. —, 512 F.2d 1390 (1975).

¹¹The government attempted to frighten the court below by suggesting that upholding the decision of the Commission could expose it to liability amounting to "billions of dollars".

There are 49 cases presently pending before the Commission presenting accounting claims involving IMPL funds. We have examined the accounting reports filed by the Government in these cases with respect to IMPL funds. The aggregate amount deposited in the common IMPL account between 1883 and 1930 to the credit of the tribes involved was less than 20 million dollars.

Although the government's suggestion of liability "amounting to billions" is irresponsible exaggeration, the loss sustained by the tribes that have justiciable claims for breach of the obligation to have made their IMPL funds productive is substantial and its recovery would be very meaningful to them.

They contended that the 1841 Act was one independently sufficient source of the *obligation to have made the funds productive by investment*, and that it specifically prescribes the measure of damages for breach of that obligation. They also contended that the obligation would have existed in the absence of the 1841 Act, independently, under (1) the common law of trusts; (2) the standards of fair and honorable dealings; and (3) after May 25, 1918, the act of that date, all enforceable under the Indian Claims Commission Act. Additionally, they pointed out that it would not have been permissible under the Fifth Amendment (also enforceable under the Indian Claims Commission Act) for the government to have taken the use of their money without subjecting itself to a constitutional obligation to render just compensation.¹²

¹²*Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937):

... Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. And, of course, an act of Congress should not be given a construction which will imperil its validity where it is reasonably open to a construction free from such peril.

Henkels v. Sutherland, 271 U.S. 298, 301 (1926):

... Whether the government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the property or its proceeds, without coming into conflict with the constitution.

[Footnote continued]

As the dissent below points out, no prior case holding the 1841 Act inapplicable involved true trust funds—funds that were indisputably the private property of another at the time the government obtained possession. Here, though it is conceded by all that the funds involved were of such character, the court below concluded, nevertheless, that they were not “funds held in trust by the United States,” within the meaning of the 1841 Act because, according to the court, the statute does not mean what it plainly says.

Where the government takes possession and expressly constitutes itself trustee of funds and property belonging to an Indian tribe, it has never been doubted that its conduct is to be judged according to the same standards as apply to any other trustee. *E.g.*, *Seminole Nation v. United States*, 316 U.S. 286, 296-98. A principal obligation of a trustee is to make trust funds productive (*Restatement, (Second), Trusts* §181), and the court below has previously held the government subject to this obligation in its dealings as trustee with Indian funds. *E.g.*, *Menominee Tribe v. United States*, 101 Ct. Cl. 10, 20 (1944).

Apart from the 1841 Act, petitioners contended that the government owed them the obligation to make their trust funds productive under the common law of trusts

If, tomorrow, Congress were to pass a law providing that tribal moneys which the government has in its possession and is administering as trustee should neither be invested nor credited with interest, no one would seriously contend that the law was constitutional or that its implementation would not subject the United States to an obligation to render just compensation for the taking of the use of private property. Neither the law of trusts nor the Constitution has changed in any relevant particular from the founding of the Nation to the present time.

(enforceable under clause 2 of section 2 of the Indian Claims Commission Act), under the standards of fair and honorable dealings (enforceable under clause 5 of section 2 of such act) and, after its date, under section 28 of the Act of May 25, 1918 (enforceable under clause 1 of section 2 of such act).

Other than to repeat the refrain, that to allow petitioners to recover for failure of the government to have made their trust funds productive would be to award interest on a claim against the United States, the court below made no attempt to explain why the government, admittedly in the position of trustee, was exempt from the obligation of productivity, or why it ought not be held liable under the Indian Claims Commission Act for breach of such obligation.

Finally, notwithstanding that the funds involved were the private property of petitioners in the constitutional sense when the government took possession of them, the court below failed to address the question of how the government could have taken the use of such funds for its own benefit without assuming an obligation to render compensation.

The decision below, that the government can take possession of the private funds of an Indian tribe and use them for its own purposes, without subjecting itself to any obligation either, as trustee, to make them productive for the tribe's benefit, or as sovereign, to compensate for their use, misconstrues section 2 of the 1841 Act (31 U.S.C. §547a) and ignores other relevant statutes (including section 28 of the Act of May 25, 1918, precursor of 25 U.S.C. §162a), the common law of trusts, the standards of fair and honorable dealings, and the Fifth Amendment. If allowed to stand, it will work a

gross injustice and result in substantial loss to the several tribes having justiciable claims for the government's past failures to have made their trust funds productive, and will distort the law respecting the obligations owed by the government when, contemporaneously, it undertakes to act as trustee of Indian funds and property.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Claims.

Respectfully submitted,

I. S. WEISSBRODT

RICHMOND F. ALLAN

Weissbrodt & Weissbrodt
1614 Twentieth Street, N.W.
Washington, D.C. 20009

FRANCES L. HORN

PIERRE J. LAFORCE

Wilkinson, Cragun & Barker
1735 New York Ave., N.W.
Washington, D.C. 20006

Counsel for Petitioners.

Of Counsel:

HOWARD L. SRIBNICK

ROBIN A. FRIEDMAN

January 2, 1976